(2)

No. 03-1463

Supreme Court, U.S.
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In The

Supreme Court of the United States

MARTIN HOOD,

Petitioner,

v.

STATE FARM FIRE AND CASUALTY COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

(1) Has Petitioner forfeited all rights to appeal the striking of his untimely jury demand because he never objected to the magistrate's order striking the jury demand and thus never raised the issue before the district judge?

(2) Where Petitioner gives no reason for his untimely jury demand and the only reason is his inadvertence, may the Ninth Circuit Court of Appeals properly apply Rule 39(b) of the Federal Rules of Civil Procedure such that relief cannot be granted?

LIST OF PARTIES TO THE PROCEEDING

Petitioner is Martin Hood

Respondent is State Farm Fire And Casualty Company

CORPORATE DISCLOSURE STATEMENT

Respondent State Farm Fire And Casualty Company ("Respondent") is a wholly owned subsidiary of State Farm Mutual Automobile Insurance Company ("State Farm Auto"). State Farm Auto is a mutual insurance company having no stock of any kind and no publicly traded stock.

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OPINIONS AND ORDERS BELOW

On June 8, 1999, the magistrate granted Respondent's motion to strike Petitioner's untimely jury demand. The action proceeded to bench trial, and on November 26, 2001, the district judge issued unpublished Findings Of Fact And Conclusions Of Law in favor of Respondent, ruling *inter alia* that Petitioner set fire to his home for purposes of obtaining insurance proceeds, intentionally concealed and misrepresented material facts related to his claim for insurance benefits, and that his insurance policy was thus void.

Petitioner appealed to the Ninth Circuit Court of Appeals on the sole issue of whether he was entitled to a jury trial. On December 5, 2003, the Ninth Circuit issued an unpublished Memorandum affirming the lower court. Subsequently, on January 23, 2004, the Ninth Circuit also issued an unpublished Order denying Petitioner's Petition for Rehearing En Banc.

All of these opinions and orders are attached to the Petition For A Writ Of Certiorari in Appendix A.

JURISDICTION

The Petition For Rehearing En Banc was denied by the Ninth Circuit Court of Appeals on January 23, 2004. The petition for a writ of certiorari was filed on April 19, 2004. Jurisdiction in this case is based on 28 U.S.C. § 1254.

REGULATORY PROVISIONS INVOLVED

Federal Rules

Rule 72(a) of the Federal Rules of Civil Procedure

Rule 72. Magistrate Judges; Pretrial Orders

(a) Nondispositive Matters. A magistrate judge to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made. The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law.

Rule 81(c) of the Federal Rules of Civil Procedure

Rule 81. Applicability in General

* * *

(c) Removed Actions. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20

days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is served within 10 days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within 10 days after service on the party of the notice of filing the petition. A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by that party of trial by jury.

Rule 39(b) of the Federal Rules of Civil Procedure

Rule 39. Trial by Jury or by the Court

* * *

(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of

a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

Hawaii Rules

Rule 38 of the Hawaii Rules of Civil Procedure (1999)

Rule 38. Jury Trial of Right

(a) Right Preserved. The right of trial by jury as given by the Constitution or a statute of the State or the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party. Where by statute a jury trial is allowed on appeal to the circuit court from the prior determination of any court or administrative body, a trial by jury may be had if demanded in the notice of appeal, and if not demanded in the notice, the appellee may have a trial by jury by filing a demand within 10 days after the case is docketed in the circuit court.

(c) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand

for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

COUNTER-STATEMENT OF THE CASE

A. Basis For Federal Jurisdiction

Federal jurisdiction is proper based on subject matter jurisdiction under 28 U.S.C. § 1332 (diversity of citizenship). The action was initiated in state court between non-diverse parties (Petitioner and a defendant State Farm adjuster were both residents of Hawaii). However, after the adjuster was dismissed, the action was timely removed by Respondent to federal court. Petitioner was at all relevant times a resident of Hawaii and Respondent is a business organized and existing under the laws of the State of Illinois with its principal place of business in Bloomington, Illinois.

B. Material Facts

The facts relevant to the petition relate to Petitioner's untimely demand for jury trial and his failure to object to the magistrate's order striking his jury demand.

Petitioner brought the action in state court, filing the Complaint on February 13, 1998 and the First Amended Complaint on February 20, 1998 against Respondent and

its adjuster, Jeff Ball ("Ball"). On April 27, 1998, Respondent and Ball each filed their respective Answer to First Amended Complaint. These were the last pleadings filed. *While this case was in the state court, Petitioner never filed a demand for jury trial.*

After Ball was granted summary judgment and dismissed from the case, Respondent filed a Notice of Removal to the U.S. District Court on January 13, 1999. On January 14, 1999, Respondent filed and served Petitioner with its Notice of Filing Notice of Removal.

On February 19, 1999, more than a year after initiating the action and thirty-six (36) days after the Notice of Removal was served, Petitioner filed an untimely Demand For Trial By Jury without seeking leave of court to do so. On April 20, 1999, Respondent filed a Motion To Strike Jury Demand, asserting that Petitioner's demand for jury trial was untimely under FRCP 81(c) and that Petitioner had thus waived his right to jury trial.

On May 3, 1999, Petitioner filed a two-page Memorandum In Opposition to the Motion To Strike, which *did not provide any explanation why his jury demand was late.*

On June 8, 1999, the magistrate judge granted Respondent's Motion To Strike Jury Demand on the grounds that Petitioner's demand for jury trial was untimely under FRCP 81(c), such that Petitioner had waived trial by jury, and the court had no discretion to order a jury trial under FRCP 39(b). Importantly, *Petitioner never objected to the magistrate's order, nor did he seek any review by the district judge.* Rather, without any objection from Petitioner, the case proceeded to a bench trial which commenced before the district judge in September 2001 – more than two years after the magistrate had struck

Petitioner's jury demand. Only after the district judge ruled against Petitioner did he raise the issue, on appeal to the Ninth Circuit, that the magistrate improperly struck his late jury demand.

The Ninth Circuit Court, in turn, affirmed the striking of Petitioner's late jury demand, and also denied Petitioner's request for a rehearing en banc.

REASONS THE PETITION SHOULD BE DENIED

A. Summary of Arguments

First, Petitioner has forfeited any right to appeal the magistrate's order striking his untimely jury demand. Under FRCP 72(a), Petitioner had ten days to object to the magistrate's order and seek review by the district judge. Since he did not so object, he waived his right to appellate review of the magistrate's order. Petitioner also did not properly invoke FRCP 39(b) in the first instance because he never brought a motion seeking relief from his untimely jury demand, as required by the rule.

Second, even if this Court were to consider the merits of the Petition, there is no compelling reason to grant review of this matter. On several occasions, this Court has already denied review of Ninth Circuit cases addressing this same issue. Indeed, when addressing circumstances where there is no explanation for a late jury demand, Ninth Circuit law is not inconsistent with the other circuits which also typically deny relief. Further, Ninth Circuit law is consistent with decisions by this Court which affirm that a party can waive a constitutional right

if they do not meet requirements for properly asserting those rights.

B. Petitioner Has Forfeited Any Appeal Regarding His Untimely Jury Demand

(1) Petitioner Failed To Object To The Magistrate's Ruling

Under FRCP 72(a), in order to preserve his right to appeal the issue, Petitioner was required to object within ten days of receiving the magistrate's order striking his jury demand. The rule states, in pertinent part:

> **Magistrate Judges; Pretrial Orders**
>
> **(a) Nondispositive Matters.** A magistrate judge to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. *Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made. . . .*

Fed. R. Civ. Pro. 72(a) (emphasis added).

In *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170 (9th Cir. 1996), the Ninth Court discussed the background of Rule 72(a) and the requirement that a party object to a magistrate's nondispositive order, or waive the issue for appeal.

> Enacted in 1983, Rule 72(a) provides that within ten days of being served with a copy of a magistrate judge's nondispositive order, a party may

> file objections to the order with the district judge to whom the case is assigned. *Since the 1991 amendment to Rule 72(a) became effective on December 1, 1991, the Rule has also explicitly prohibited an aggrieved party who fails to object within the ten-day period from later "assigning as error a defect in the magistrate judge's order."* Fed.R.Civ.P. 72(a). At least two other circuits have relied on Rule 72(a) in concluding that a magistrate judge's nondispositive order must have been reviewed by the district court in order to be appealable. *Pagano v. Frank*, 983 F.2d 343, 346 (1st Cir. 1993); *CNPqConselho Nacional de Desenvolvimento Cientifico e Technologico v. Inter-Trade, Inc.*, 50 F.3d 56, 57 (D.C. Cir. 1995); *see Charter Oil Co. v. American Employers' Ins. Co.*, 69 F.3d 1160, 1171-72 n.4 (D.C. Cir. 1995) (explaining *CNPq* and Rule 72(a)). We find these cases persuasive and conclude that a party who fails to file timely objections to a magistrate judge's nondispositive order with the district judge to whom the case is assigned forfeits its right to appellate review of that order.
>
> *Simpson*, 77 F.3d at 1173-74 (emphasis added).[1]

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[1] The Ninth Circuit Court also noted that prior Ninth Circuit cases in this area, which had "not been entirely consistent", were decided *before* the 1991 amendment to Rule 72(a) and have therefore been superseded by the amended rule. *Simpson*, 77 F.3d at 1174 (comparing *U.S. Dominator, Inc. v. Factory Ship Robert E. Resoff*, 768 F.2d 1099 (9th Cir. 1985) and *United States v. Bogard*, 846 F.2d 563 (9th Cir. 1988), with *Palmer v. United States*, 794 F.2d 524 (9th Cir. 1986) and *McKeever v. Block*, 932 F.2d 795 (9th Cir. 1991)). As set out in *Simpson*, the *Dominator* and *Bogard* cases have been superseded by Rule 72(a)).

In addition to the cases from the First Circuit and the District of Columbia Circuit referenced in the *Simpson* decision, the Third Circuit and Tenth Circuit have also similarly ruled that a party forfeits its appeal as to a magistrate's nondispositive order where no objection is raised below. In *United Steelworkers of America, AFL-CIO v. New Jersey Zinc Co., Inc.*, 828 F.2d 1001 (3rd Cir. 1987), a magistrate granted a motion striking the plaintiff's *demand for jury trial*, and the plaintiff did not object to the district judge. The Third Circuit Court thus held the plaintiff had waived the issue for appeal, stating:

> We do not reach Steelworkers' contention that the magistrate erred because we conclude that Steelworkers failed to preserve that issue in that it filed no objections to the magistrate's ruling and never raised the issue before the district court either before or during the course of the bench trial.

Id. at 1004-1005.

Moreover, the Court raised the concern that allowing an appeal to go forward in this situation would be to condone unfair trial tactics.

> We cannot escape drawing the inference that Steelworkers, which never once suggested to the district court that it preferred a jury trial to the bench trial given it, wished to have two bites to the proverbial apple, and awaited that court's decision on the merits before raising the jury trial issue which it held in reserve for a possible appeal. We cannot condone such trial tactics.

Id. at 1008.

Likewise, in *Frontier Refining Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695 (10th Cir. 1998), the Tenth Circuit Court ruled the plaintiff was precluded from raising on appeal a magistrate's joinder of parties, where the plaintiff had failed to seek review with the district judge. The court explained that by not timely objecting to the district judge, a party "[strips] the district court of its function of effectively reviewing the magistrates' order" and "[frustrates] the policy behind the Magistrate's Act, i.e., to relieve courts of unnecessary work." *Frontier*, 136 F.3d at 706 (citing to *Niehaus v. Kansas Bar Ass'n*, 793 F.2d 1159, 1165 (10th Cir. 1986)).

> Frontier proceeded through trial without objecting to the magistrate's order, thereby allowing significant judicial resources to be expended on a trial in which Frontier contends inappropriate parties were joined. The text of Rule 72 and precedent preclude Frontier from now raising an objection to the magistrate's ruling allowing joinder. [Citations omitted].

Frontier, 136 F.3d at 706-707.

Here, Respondent's motion to strike Petitioner's untimely jury demand was a nondispositive motion decided by the magistrate. *See United Steelworkers of America, supra*; Rule 72(a); 28 U.S.C. § 636(b)(1)(A). Petitioner never objected to the magistrate's order, never brought the issue before the district judge, and instead waited until after the bench trial was completed and a ruling issued by the district judge in favor of Respondent, before raising the jury trial issue for the first time during the appeal process. Petitioner has waived the issue and cannot seek review from this Court. *See* Rule 72(a); *Simpson*, *supra*; *United Steelworkers of America*, *supra*; *Frontier*, *supra*;

Pagano v. Frank, 983 F.2d 343, 346 (1st Cir. 1993).[2] Hence, the Petition should be rejected on these grounds.

(2) Petitioner Failed To Properly Invoke Rule 39(b)

Rule 39(b) requires that a motion be brought to seek the court's relief from an untimely jury demand:

> **(b) By the Court.** Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion *upon motion* may order a trial by a jury of any or all issues. (Emphasis added).

Petitioner's premise – that the magistrate should have exercised discretion in considering whether to strike the untimely jury demand – was never properly invoked because Petitioner did not bring a motion seeking such relief. Rather, Petitioner simply filed the late jury demand

[2] A case cited by Petitioner provides further support for Respondent's position that failure to preserve the issue precludes a later appeal. In *Malbon v. Pennsylvania Millers Mutual Insurance Company*, 636 F.2d 936 (4th Cir. 1980), the Fourth Circuit Court refused to consider the appellants' argument that the lower court had "completely abdicated its duty to exercise its discretion." 636 F.2d at 940. Because the appellants had failed to challenge the striking of their late jury demand *on these particular grounds*, the issue was not preserved for appeal. Likewise, in this case, Petitioner did not assert to the magistrate that the Ninth Circuit law regarding Rule 39(b) was incorrect. The issue has not been preserved for appeal in this case.

without leave of court. For this additional reason, Petitioner failed to preserve his rights for the instant Petition.

C. There Is No Compelling Reason To Grant Review

(1) This Court Has Previously Denied Review of This Issue

On at least four previous occasions, this Court has denied requests to review cases where the Ninth Circuit's application of Rule 39(b) in similar circumstances was in issue. *Pacific Fisheries Corp. v. H.I.H. Casualty & General Insurance, Ltd.*, 239 F.3d 1000 (9th Cir. 2001), *cert. denied*, 534 U.S. 944, 122 S.Ct. 324 (2001); *Kletzelman v. Capistrano Unified School Dist.*, 70 F.3d 1279 (9th Cir. 1995) (Table), *cert. denied*, 517 U.S. 1191, 116 S.Ct. 1681 (1996), *redesignated as Opinion*, 91 F.3d 68 (9th Cir. 1996); *Craig v. Atlantic Richfield Co.*, 19 F.3d 472 (9th Cir. 1994), *cert. denied*, 513 U.S. 875, 115 S.Ct. 203 (1994); *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984), *cert. denied*, 474 U.S. 865, 106 S.Ct. 183 (1985).

In the most recent case of *Pacific Fisheries*, the Ninth Circuit affirmed the district court's denial of the plaintiff's untimely jury demand, which was due to attorney inadvertence or oversight. Relying on prior case law in the circuit, the Ninth Circuit Court ruled that "[a]n untimely request for a jury trial must be denied unless some cause beyond mere inadvertence is shown." 239 F.3d at 1002. The plaintiff's petition for a writ of certiorari to this Court was denied, 534 U.S. 944, 122 S.Ct. 324 (2001), just as prior similar petitions from the Ninth Circuit had been denied. *See Craig*, *supra* (petition for writ of certiorari denied where Ninth Circuit held that trial court could not grant

relief under Rule 39(b) when failure to make timely jury demand resulted from oversight or inadvertence); *Kletzelman, supra*; and *Blau, supra*.

(2) Ninth Circuit Law Is Consistent With Other Circuits

Petitioner does not dispute that his demand for a jury trial was late, or that he never provided a reason for the untimely demand. Rather, Petitioner takes issue with the long-standing Ninth Circuit rule that, *in circumstances where no reason is given or the only reason is inadvertence*, the district court has no discretion to grant relief under Rule 39(b). *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1086 (9th Cir. 2002); *Pacific Fisheries, supra*; *Russ v. Standard Ins. Co.*, 120 F.3d 988, 989 (9th Cir. 1997); *Kletzelman, supra*; *Craig, supra*; *Blau, supra*; *Lewis v. Time Inc.*, 710 F.2d 549, 556-57 (9th Cir. 1983); *Wall v. National Railroad Passenger Corp.*, 718 F.2d 906 (9th Cir. 1983); *Beckham v. Safeco Insurance Company of America*, 691 F.2d 898 (9th Cir. 1982); *Chandler Supply Co. v. GAF Corp.*, 650 F.2d 983, 987-988 (9th Cir. 1980); *Mardesich v. Marciel*, 538 F.2d 848, 849 (9th Cir. 1976). Although the Ninth Circuit rule may be stated more narrowly, it is consistent with most other jurisdictions which typically do not provide relief in these circumstances.

Although applying varying tests or rules regarding Rule 39(b), the Second, Third, Fifth, Sixth, Eight, Tenth, Eleventh, and D.C. Circuits have each expressed that inadvertence is not a favorable ground for allowing an untimely demand for jury trial. *See Noonan v. Cunard Steamship Co.*, 375 F.2d 69 (2nd Cir. 1967); *Galella v.*

Onassis, 487 F.2d 986 (2nd Cir. 1973); *United States Securities and Exchange Commission v. Infinity Group Co.*, 212 F.3d 180, 195 (3rd Cir. 2000), *cert. denied*, 532 U.S. 905, 121 S.Ct. 1228 (2001); *Farias v. Bexar County Board of Trustees For Mental Health Mental Retardation Services*, 925 F.2d 866 (5th Cir. 1991), *reh'g denied*, 931 F.2d 892 (5th Cir. 1991), *cert. denied*, 502 U.S. 866, 112 S.Ct. 193 (1991) (noting a long line of Fifth Circuit cases which recognize that a district judge properly denies an untimely jury demand when the failure to make a timely demand results from mere inadvertence); *O'Malley v. United States Fidelity and Guaranty Co.*, 776 F.2d 494, 502 (5th Cir. 1985); *Rhodes v. Amarillo Hospital District*, 654 F.2d 1148 (5th Cir. 1981); *Kitchen v. Chippewa Valley Schools*, 825 F.2d 1004 (6th Cir. 1987); *Littlefield v. Fort Dodge Messenger*, 614 F.2d 581 (8th Cir. 1980), *cert. denied*, 445 U.S. 945, 100 S.Ct. 1342 (1980); *Nissan Motor Corp. in U.S.A. v. Burciaga*, 982 F.2d 408 (10th Cir. 1992); *Parrot v. Wilson*, 707 F.2d 1262 (11th Cir. 1983), *cert. denied*, 464 U.S. 936, 104 S.Ct. 344 (1983); *BCCI Holdings v. Khalil*, 214 F.3d 168 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 958, 121 S.Ct. 382 (2000). Moreover, numerous district courts around the country have made similar rulings. *See*, Annotation, *Discretion of District Court Under Rule 39(b) Of Federal Rules of Civil Procedure, Authorizing It To Order Jury Trial Notwithstanding Party's Failure To Make Seasonable Demand For Jury*, 6 ALR Fed. 217 at § 7 (1971) ("[m]ost of the cases, but not all, agree that mere oversight or the like on the part of counsel in failing to make a timely jury demand is an insufficient ground for granting a belated motion for trial by jury under Rule 39(b).").

The cases cited by Petitioner do not support his assertion that, if this action were filed in any circuit other than the Ninth Circuit or Second Circuit, "it is likely that the district court would have granted a request under Rule 39(b) for a jury trial." *See* Petition at p. 4. Rather, most of the cases cited by Petitioner either do not deal with circumstances where mere oversight or inadvertence are involved – such as *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194 (1st Cir. 1987) (pro se plaintiff) and *Members v. Paige*, 140 F.3d 699 (7th Cir. 1998) – or, similar to the Ninth Circuit, the cases actually *deny* relief when the reason for the untimely demand is inadvertence. *See Infinity Group Co.*, 212 F.3d at 195 ("Courts in this Circuit generally deny relief when 'the only basis for such relief advanced by the requesting party is the inadvertence or oversight of counsel.'"); *Kitchen*, *supra*; *Littlefield*, *supra*; *Nissan Motor Corp.*, *supra*; *BCCI Holdings*, *supra*.[3]

(3) Ninth Circuit Law Is Consistent With Constitutional Requirements And U.S. Supreme Court Rulings

Finally, the Ninth Circuit law related to Rule 39(b) is consistent with constitutional requirements and rulings of this Court. In *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 99 S.Ct. 645 (1979), this Court fully recognized that

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[3] Petitioner's reliance on *Cascone v. Ortho Pharmaceutical Corp.*, 702 F.2d 389 (2nd Cir. 1983) is likewise unavailing and distinguishable. Unlike in *Cascone*, where the court stated "there was more than mere inadvertence here," 702 F.2d at 393, there is nothing in this case record to suggest that Petitioner's counsel was unfamiliar with or new to federal court practice.

procedural devices affecting the right to a jury trial did not impinge on Seventh Amendment rights. Addressing whether collateral estoppel could preclude the petitioner from having a jury trial on issues previously decided in a nonjury case, the Court held that estoppel did not violate the Seventh Amendment. The Court further noted that:

> [M]any procedural devices developed since 1791 that have diminished the civil jury's historic domain have been found not to be inconsistent with the Seventh Amendment. *See Galloway v. United States*, 319 U.S. 372, 388-393, 63 S.Ct. 1077, 1086-1088, 87 L.Ed. 1458 (directed verdict does not violate the Seventh Amendment); *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 497-498, 51 S.Ct. 513-514, 75 L.Ed. 1188 (retrial limited to question of damages does not violate the Seventh Amendment even though there was no practice at common law for setting aside a verdict in part); *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-321, 23 S.Ct. 120, 121-122, 47 L.Ed. 194 (summary judgment does not violate the Seventh Amendment).

439 U.S. at 336, 99 S.Ct. at 654.

Quoting from the *Galloway* case, the Court further stated:

> "The more logical conclusion, we think, and the one which both history and the previous decisions here support, is that the [Seventh] Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions." 319

U.S., at 390, 392, 63 S.Ct., at 1087 (footnote omitted).

439 U.S. at 337, 99 S.Ct. at 654.

See also, *United States v. Moore*, 340 U.S. 616, 71 S.Ct. 524 (1951) (where no demand for jury trial was made, any right to jury trial was waived under Rule 38).

In *Wilson v. Corning Glass Works*, 195 F.2d 825 (9th Cir. 1952), the Ninth Circuit held that there was no constitutional infirmity where plaintiff's motion for jury trial under Rule 39(b) was denied since no reason for the late demand was given. In reaching its decision, the court emphasized that, in considering the constitutional dimensions of the right to jury trial, *a party may be required to timely assert a constitutional right in order to preserve it. Id.* at 828, *citing Yakus v. United States*, 321 U.S. 414, 444, 64 S.Ct. 660, 677 (1944); *Capital Traction Co. v. Hof*, 174 U.S. 1, 23, 19 S.Ct. 580, 589 (1899) (Seventh Amendment "does not prescribe . . . what conditions may be imposed upon the demand of such a [jury] trial, consistently with preserving the right to it. In passing upon these questions, the judicial decisions and the settled practice in the several states are entitled to great weight. . . . "); *Kass v. Baskin*, 164 F.2d 513, 514 (5th Cir. 1947).

The Ninth Circuit law is within constitutional limits and is consistent with the rulings of this Court that a party can be required to assert their constitutional rights in a timely manner in order to preserve them.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition For Writ Of Certiorari be denied.

Respectfully submitted,

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